Fong Yin Kui @ Anthony Fong v The Director of Forestry Department & Anor

HIGH COURT (SANDAKAN) — CIVIL SUIT NO S21–12 OF 2007
YEW JEN KIE JC
29 SEPTEMBER 2009

Trade and Industry — Forestry — License to take timber — Refusal to renew licence — Whether decision mala fide — Whether plaintiff had locus standi to commence action — Whether contravened s 24(6) of the Forest Enactment 1968 — Estoppel — Issue of — Whether arose — Whether plaintiff entitled to damages for seizure of logs — Whether plaintiff proved claim on balance of probabilities — Forest Enactment 1968 s 24(6)

Digibit was the holder of an annually renewable timber license in respect of a certain area ('the licensed area'). It entered into a timber sale agreement with FKSB and appointed FKSB as its attorney vide a power of attorney. The plaintiff was the sole proprietor of one Berjaya. Pursuant to a sale and purchase agreement between Berjaya and FKSB, the plaintiff purchased, inter alia, all the timber felled from six licensed areas including the timber from Digibit's licensed area. The plaintiff then engaged Teguh Wajar Sdn Bhd, to extract timber in the licensed area. The first defendant's servants subsequently seized some 1,794 logs on suspicion of being illegally felled. The plaintiff contended that the seized logs belonged to the plaintiff and that they were auctioned off unlawfully and below the market price. The plaintiff further claimed that the first defendant had failed to renew the timber license without valid reasons. The plaintiff claimed that the license had been suspended on the purported ground that the plaintiff had infringed the Sabah Forest Rules 1969, without giving the plaintiff a chance to explain, thereby contravening the rules of natural justice. The plaintiff thus sought from the defendants, inter alia, a declaration that the first defendant's refusal to renew the plaintiff's license to extract timber was bad in law as he had acted in bad faith and/or his decision was made mala fide. The defendants however defended the action on the basis that: (a) the logs were legally seized and auctioned off; (b) the actions taken by the forestry officers were in accordance with the Forest Enactment 1968; (c) the plaintiff had no cause of action to bring the action. The issues for the High Court's determination were: (i) whether the plaintiff being a mere holder of a substituted power of attorney had any locus standi to commence the action; (ii) whether the defendants were estopped from raising the issue of licence being personal to holder; (iii) whether plaintiff had locus standi to claim the declaration that the refusal to renew the timber license was unlawful and mala fide; and (iv) whether the

A plaintiff was entitled to damages for the alleged wrongful seizure of 1,794 logs.

Held, dismissing the plaintiff's case:

B (1) The assignment of the timber license firstly by Digibit to FKSB and then subsequently by FKSB to Berjaya was illegal and in contravention of s 24(6) of the Forest Enactment 1968. The plaintiff thus had no locus standi to commence the action (see paras 50 & 51); *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 followed; C *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 followed.

(2) The plaintiff could not rely on the doctrine of estoppel. The effect would nullify the statutory provisions or to prevent the enforcement of law. Even though the first defendant had in the past mistakenly or D otherwise allowed the plaintiff to pay for royalty and to apply for necessary passes or renew the license, that did not prevent the first defendant from raising the issue of illegality. To accept the plaintiff's argument would allow a person to achieve by estoppel against him something which he could not otherwise lawfully do. The acceptance of E estoppel would have the effect of nullifying the provisions of the Enactment and allowing an act which under the Enactment could not otherwise be lawfully done (see para 59); *Public Textiles Berhad v Lembaga Letrik Negara* [1976] 2 MLJ 58 followed; *Commissioners of Customs and Excise v Hebson Ltd* [1953] 2 Lloyd's Rep 382 followed.

F (3) The first defendant was not a party to any of the agreements between Digibit and FKSB and between FKSB with Berjaya. There is no law that says license must be renewed only by the licensee and the forestry department should reject or object to applications which are not submitted by the licensees themselves. The plaintiff thus had no locus G standi to seek the declaration that the refusal to renew the timber license was unlawful and mala fide. In any event, the cancellation of the license was in accordance with s 24D of the Enactment (see paras 63, 64 & 68).

H (4) From the evidence, the plaintiff had not shown that the seized logs were felled within the licensed area and that they were unlawfully seized. On the contrary, the evidence showed that the plaintiff knew that the seized logs were illegally felled. The plaintiff had not proved his claim on a balance of probabilities (see paras 105 & 106).

I **[Bahasa Malaysia summary**

Digibit adalah pemegang lesen pembalakan yang boleh dibaharui setiap tahun bagi kawasan tertentu ('kawasan berlesen'). Ia menandatangani perjanjian jualan balak dengan FKSB dan melantik FKSB sebagai wakilnya

melalui surat kuasa wakil. Plaintif merupakan pemilik tunggal Berjaya. Berikutan satu perjanjian jual beli di antara Berjaya dan FKSB, plaintif membeli, antara lain, kesemua balak yang ditebang daripada enam kawasan berlesen termasuk balak daripada kawasan berlesen Digibit. Plaintif kemudian melantik Teguh Wajar Sdn Bhd, untuk membalak di kawasan berlesen tersebut. Pekerja defendan pertama kemudian merampas sebanyak 1,794 kayu balak kerana disyaki ditebang secara haram. Plaintif menghujah bahawa kayu-kayu balak yang dirampas adalah milik plaintif dan bahawa ia telah dilelong secara tidak sah dan di bawah harga pasaran. Plaintif selanjutnya mendakwa bahawa defendan pertama telah gagal untuk membaharui lesen pembalakan tanpa alasan yang sah. Plaintif mendakwa bahawa lesen tersebut telah digantung atas alasan bahawa plaintif telah melanggar Kaedah-Kaedah Perhutanan Sabah 1969, tanpa memberikan plaintif peluang untuk menjelaskan, dengan demikian menyalahi peraturan keadilan semula jadi. Plaintif oleh itu memohon daripada defendan, antara lain, deklarasi bahawa keengganan defendan untuk membaharui lesen membalak plaintif adalah tidak sah dari segi undang-undang kerana dia bertindak dengan niat jahat dan/atau keputusannya dibuat dengan niat jahat. Defendan-defendan, walau bagaimanapun, membela tindakan tersebut atas alasan bahawa: (i) kayu-kayu balak tersebut telah dirampas dan dilelong secara sah; (ii) tindakan-tindakan yang diambil oleh pegawai-pegawai perhutanan adalah menurut Enakmen Perhutanan 1968 ('Enakmen'); dan (iii) plaintif tidak ada kausa tindakan untuk mengambil tindakan tersebut. Isu-isu yang perlu dipertimbangkan oleh Mahkamah Tinggi adalah: (a) sama ada plaintif sebagai pemegang surat kuasa wakil ganti semata-mata mempunyai locus standi untuk memulakan tindakan tersebut; (b) sama ada defendan-defendan diestop daripada membangkitkan isu lesen kerana ia isu peribadi kepada pemegangnya; (c) sama ada plaintif mempunyai locus standi untuk menuntut deklarasi bahawa keengganan untuk memperbaharui lesen pembalakan adalah tidak sah dan berniat jahat; dan (d) sama ada plaintif berhak kepada ganti rugi untuk rampasan salah 1,794 kayu-kayu balak.

Diputuskan, menolak kes plaintif:

(1) Penyerahhakan lesen pembalakan pertama sekali oleh Digibit kepada FKSB dan kemudiannya oleh FKSB kepada Berjaya adalah tidak sah dan menyalahi s 24(6) Enakmen. Plaintif oleh itu tidak mempunyai locus standi untuk memulakan tindakan (lihat perenggan 50 & 51); *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 diikut; *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 diikut.

(2) Plaintif tidak boleh menyandar atas doktrin estopel. Kesannya adalah untuk membatalkan peruntukan statutori atau untuk menghalang pelaksanaan undang-undang. Walaupun defendan pertama, sebelum ini, secara silap atau sebaliknya, telah membenarkan plaintif membayar

royalti dan memohon pas atau membaharui lesen yang perlu, ia tidak menghalang defendan pertama daripada menimbulkan isu ketidaksahan. Untuk menerima hujahan plaintif akan membenarkan seseorang mencapai secara estopel terhadapnya sesuatu yang dia tidak dapat buat secara sah. Penerimaan estopel akan mempunyai kesan membatalkan peruntukan di dalam Enakmen dan membenarkan tindakan yang mana di bawah Enakmen tidak boleh sebaliknya dibuat secara sah (lihat perenggan 59); *Public Textiles Berhad v Lembaga Letrik Negara* [1976] 2 MLJ 58 diikut; *Commissioners of Customs and Excise v Hebson Ltd* [1953] 2 Lloyd's Rep 382 diikut.

(3) Defendan pertama bukan pihak kepada mana-mana perjanjian di antara Digibit dan FKSB dan di antara FKSB dan Berjaya. Tidak ada undang-undang yang menyatakan bahawa lesen mesti dibaharui hanya oleh pemegang lesen dan jabatan perhutanan sewajarnya menolak atau membantah permohonan-permohonan yang tidak dikemukakan oleh pemegang lesen itu sendiri. Plaintif oleh itu tidak ada locus standi untuk memohon deklarasi bahawa keengganan untuk membaharui lesen pembalakan adalah tidak sah dan dengan niat jahat. Malahan, pembatalan lesen adalah menurut s 24D Enakmen tersebut (lihat perenggan 63, 64 & 68).

(4) Daripada keterangan, plaintif tidak menunjukkan bahawa kayu-kayu balak yang ditebang terangkum dalam kawasan berlesen dan bahawa mereka merampas secara salah. Sebaliknya, keterangan menunjukkan bahawa plaintif mengetahui kayu-kayu balak yang dirampas ditebang secara haram. Plaintif tidak membuktikan tuntutannya atas imbangan kebarangkalian (lihat perenggan 105 & 106).]

Notes

For cases on license to take timber, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1861–1864.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Commissioners of Customs and Excise v Hebson Ltd [1953] 2 Lloyd's Rep 382 (folld)

Cynsan Development Sdn Bhd v Majunis bin Tumpi & Ors [1997] MLJU 272; [1997] 3 CLJ 396, HC (refd)

Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd [1971] 2 MLJ 161, FC (folld)

Maritime Electric Company Ltd v General Diaries Ltd [1937] AC 610, PC (refd)

Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp [1995] 1 MLJ 401; [1995] 1 CLJ 761, FC (refd)

Public Textiles Berhad v Lembaga Letrik Negara [1976] 2 MLJ 58, FC (folld)
Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd [1977] 2 MLJ 200, FC (folld)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Civil Law Act 1956 s 11
Criminal Procedure Code s 112
Electricity Act 1949
Import, Export and Customs Powers (Defence) Act 1939 [UK]
Sabah Forest Enactment 1968 ss 23, 24, 24(6), 24D, 30
Sabah Forest Rules 1969
Sabah Limitation Ordinance (Cap 72) Schedule, Part I, item 16
Sarawak Forest Ordinance (Cap 126) s 36(1)

Edwin Tsen (Tan Pang Tsen & Co) for the plaintiff.
Zaleha Rose Pandin (Senior State Counsel, State Attorney General Office Kota Kinabalu, Sabah) for the defendants.

Yew Jen Kie JC:

INTRODUCTION

[1] In this action the plaintiff seeks from the defendants the following relief:

(a) declaration that the first defendant's refusal to renew the plaintiff's license to extract timber was bad in law as he had acted in bad faith and/or his decision was made mala fide;

(b) general damages to be assessed for the loss in the market value of 1,002 logs and 792 logs respectively that were negligently or wrongfully seized and sold by the first defendant;

(c) general damages to be assessed for the loss of income from the sale of 1,002 logs and 792 logs from the said licensed area and for refusing to renew the plaintiff's license to extract logs;

(d) further or in the alternative, exemplary and/or general damages to be assessed for the negligent act and/or wrongful seizure and sale of logs by the first and second defendants and for refusing to renew the plaintiff's license to extract logs;

(e) statutory interest at 8% on items (ii), (iii) and (iv) from the date of seizure of the logs in April 2005 until full payment pursuant to s 11 of the Civil Law Act 1956 or alternatively statutory interest at 8%pa from the date of writ until full payment; and

(f) costs on a full indemnity basis.

BACKGROUND FACTS AND SEQUENCE OF EVENT

[2] Digibit Sdn Bhd was the holder of an annually renewable timber license No JP (SBN) 027/2001(F1) for an area of approximately 499.05 hectares in Bonggaya Forest Reserve, Sandakan. The license was effective from 11 January 2002 and was subsequently renewed annually until 13 September 2005.

[3] Digibit Sdn Bhd entered into a timber sale agreement dated 8 April 2002 with Fajar Kayangan Sdn Bhd ('FKSB') and appointed FKSB as its attorney vide power of attorney dated 30 March 2002.

[4] FKSB and Syarikat Berjaya entered into a sale and purchase agreement dated 23 April 2002 and substitution under a power of attorney dated 23 March 2002 was granted to Syarikat Berjaya by FKSB.

[5] The plaintiff is the sole proprietor of Syarikat Berjaya. Sastra bin Padang was his nominee and he had granted a power of attorney dated 23 April 2002 to the plaintiff to act for Syarikat Berjaya.

[6] The plaintiff engaged Teguh Wajar Sdn Bhd as contractor and up to March 2005 had extracted 294 logs.

[7] On 11 November 2005, Digibit Sdn Bhd applied for the measurement/scaling of 711 logs, which was approved on 14 March 2005 (p 100 of the PBD). Following which measurement/scaling were done; payment of royalty duly paid and removal passes to remove the 711 logs from the licensed area to Pangkalan was duly issued on 28 and 29 April 2005.

[8] On 28 June 2005, the staff of DFO during their routine inspections at Pangkalan came across a few barges of logs which upon inspection were found to be different from the 711 logs. These logs were accordingly seized on suspicion of being illegally felled from the forest reserve. Subsequent inspection found that fake hammer marks were stamped on these logs and police report was duly lodged.

[9] On 2 July 2005 to 7 July 2005, a further 558 logs were found lying alongside the road in different location inside the Forest Reserve.

[10] On 20 July 2005, the Director of Forestry issued a show cause letter to the licensee, the same was copied to Fajar Kayangan Sdn Bhd and Syarikat Berjaya.

[11] On 21 July 2005, the first defendant issued the notice of seizure.

[12] On 22 July 2005, the licensee wrote to the forestry department stating, amongst others, that they agreed to the action taken by the Director of Forestry to cancel the license.

[13] On the same day, Fajar Kayangan also wrote to the Director of Forestry giving its written consent for the license to be cancelled.

[14] On 25 July 2006, a second report was lodged in respect of the 792 logs that were found and seized in Bonggaya Forest Reserve.

[15] On 9 August 2005, PW2's statement under s 112 of the Criminal Procedure Code was recorded.

[16] On 11 August 2005, first notice of auction was issued fixing the auction on 19 August 2005.

[17] On 16 August 2005, the plaintiff's statement under s 112 of the Criminal Procedure Code was recorded.

[18] On 19 August 2005, second notice of auction was issued fixing the auction on 30 August 2005. On which date the 1,792 seized logs (1,002 + 792) were successfully auctioned off.

[19] On 7 August 2005, the plaintiff vide his solicitors wrote to the first defendant demanding compensation for the logs.

[20] On 15 February 2007, the plaintiff filed the present suit.

THE PLAINTIFF'S CASE

[21] The plaintiff contends that pursuant to a sale and purchase agreement dated 23 April 2002 between Syarikat Berjaya and Fajar Kayangan Sdn Bhd, the plaintiff had purchased all the timber from six licensed areas, including the area licensed to Digibit Sdn Bhd (the licensed area).

[22] The plaintiff engaged a contractor, Teguh Wajar Sdn Bhd to carry out extraction works in the licensed area. Up until March 2005, the contractor had extracted 2,794 logs from the plaintiff's licensed area.

[23] In June 2005 the first defendant's servants seized 1,002 and 792 logs belonging to the plaintiff. All the logs were auctioned off unlawfully and below the market price in July 2005.

[24] The plaintiff was never charged for illegal felling of logs outside the licensed area.

[25] The first defendant was accused of failing to renew the license without any valid reasons. The first defendant also suspended the license on the purported ground that the plaintiff had infringed the Sabah Forest Rules 1969, but without giving a chance for the plaintiff to explain thereby in contravention of the rules of natural justice.

THE DEFENDANTS' DEFENCES

[26] The first and second defendants defences are:

(a) all the 1,794 logs were found outside the licensed area.

(b) the logs were suspected of being illegally extracted outside the licensed area but within the forest reserves;

(c) the logs were legally seized and auctioned off;

(d) the actions taken by the Forestry officers were in accordance with the Sabah Forest Enactment 1968; and

(e) the plaintiff has no cause of action to bring this action against the first and second defendants. Even if the plaintiff has a cause of action, which is denied, it is statute barred under item 16 Part I of the Schedule to the Sabah Limitation Ordinance (Cap 72).

ISSUE ON LOCUS STANDI ISSUE

[27] It was contended for the defendants that the plaintiff has no locus standi to bring this action. It was submitted that s 24(6) of the Forest Enactment 1968 ('the Forest Enactment') expressly provides, amongst others, that a license shall be personal to the holder and shall not be transferable in any manner whatsoever. It was further submitted that the assignment of rights and appointment attorney vide power of attorney in respect of the timber license which was issued to Digibit Sdn Bhd is illegal as it was in contravention of the Enactment.

[28] It was next submitted that the defendants are not privy to any agreement or power of attorney executed between the licensee and FKSB and substitution under power of attorney granted by FKSB to the plaintiff. The

plaintiff being mere holder of a substituted power of attorney has no locus standi to commence this action herein. The authorities relied on are *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 and *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200.

[29] On the other hand, it was submitted for the plaintiff that the plaintiff has the locus standi to commence this action and claim for all the losses against the defendants. This is by virtue of the sale and purchase agreement found at pp 64–69 of the PBD in which the plaintiff claimed he had purchased the timber from six licensed areas including the licensed area in question covering an area of about 3,000 acres. The plaintiff claimed that he is the aggrieved person here.

[30] It was further submitted for the plaintiff that the court must examine the terms of the agreement before concluding that there was an assignment effected, citing *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp* [1995] 1 MLJ 401; [1995] 1 CLJ 761. The plaintiff also submitted that Digibit Sdn Bhd merely sold its rights in the timber to FKSB who in turn sold the timber to the plaintiff. The law does not prevent the sale of timber to a third party. There was no assignment of the license. The plaintiff was only permitted to use it, citing *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 (FC). In this instance, it was argued that *Lo Su Tsoon* and *Sundang*, are distinguishable.

[31] Section 24(6) of the Enactment states:

> A license shall be personal to the holder thereof and shall not be transferable in any manner whatsoever, and shall cease to be valid on the death of such holder or if such holder is declared to be insolvent under the provisions of any written law.

[32] In *Lo Su Tsoon*, the forest officer in Sabah issued a license for extraction of timber to Beaufort Timber Extraction Co-operative Society. The society then appointed Jesselton Development Ltd as their attorney and Jesselton Development Ltd in turn appointed the respondents in their place as for the licensees. The respondents subsequently entered into an agreement with the appellants whereby the respondents in effect transferred their rights in the license to the appellants. In their grounds of appeal, the appellants, amongst others, raised for the first time a point of illegality that the agreement was an assignment of the rights of the licensees under the license in contravention of an express condition in the license and was therefore illegal.

[33] In allowing the appeal, the Federal Court held:

(a) that the agreement was clearly in breach of the provision of ss 23 and 24 of the Enactment and therefore illegal and claim based thereon cannot be enforced; and

(b) the power of attorney given to the appellants was a colourable device to deceive others into believing that the appellants were operating as agents for the licensee.

[34] In relation to s 24(6) of the Enactment, Ismail Khan CJ (Borneo) in *Lo Su Tsoon*, said:

> The words 'personal to the holder and shall not be transferable in any manner whatsoever' are wide enough to include any form of assignment however disguised.

[35] In *Sundang Timber*, the appellants had been granted a special license by the State Government of Sabah to extract timber. Subsequently they entered into an irrevocable agency agreement with the respondents and also gave an irrevocable power of attorney to the respondents for a period of 10 years to operate and manage the appellants' business. The appellants claimed that the respondents were indebted to them and bought an action to recover the debt due on an alleged final statement of account. The respondents in their defence raised the issue of illegality. The learned trial judge ruled that the agreement read with the power of attorney was in breach of the provisions of the Enactment 1968, and was therefore illegal and any claim based thereon was unenforceable. The appellants appealed.

[36] The Federal Court agreed with the learned trial judge and held that the agreement in this case was clearly illegal being in breach of s 24(6) of the Enactment. Consequently any claim based thereon cannot succeed as it would be tainted with illegality.

[37] In another case of *Cynsan Development Sdn Bhd v Majunis bin Tumpi & Ors* [1997] MLJU 272; [1997] 3 CLJ 396, a timber license was issued in favour of the defendants pursuant to the Enactment authorising the licensee to extract forest produce. Prior to the issuance of the license, the plaintiff company and the defendants executed a 'timber sales agreement' wherein the defendants agreed to sell the timber in the concession area to the plaintiff company. In consideration thereof, some payments were made by the plaintiff company to the defendants. A power of attorney was granted on the same day by the defendant to the plaintiff. The defendant on the same day also entered into a 'timber extraction agreement' with a company called Inwill Resource Sdn Bhd.

[38] The plaintiff company then brought an action against the defendants claiming, amongst others, specific performance by the defendants of the timber sales agreement, The defendants contended that the plaintiff company breached the agreement and that the transaction was illegal. The primary issue before the court was whether the transaction between the plaintiff company and the defendant was illegal in view of s 24(6) of the Enactment. In dismissing the action, Richard Malanjum J (as His Lordship then was), found that upon reading the contents of the timber sale agreement and the power of attorney between the plaintiff and the defendants, it was irresistible conclusion that upon their execution the defendants had nothing more to do with the timber license but to merely sit back to collect the balance of their dues as agreed for parting with their rights thereunder. They had parted with all their interest in the timber license for financial consideration. And that should make the arrangement illegal being in contravention of s 24(6) of the Enactment. Hence, any claim based thereon cannot succeed by reason of illegality.

[39] In our case, was there contravention of s 24(6) of the Enactment in the agreement and the power of attorney and the substitution of power of attorney between Digibit Sdn Bhd and FKSB and Syarikat Berjaya? It is an established fact that the license was issued to Digibit Sdn Bhd to extract timber only from an approximately 499.05 hectares in Bonggaya Forest Reserve, Sandakan effective from 21 January 2002 (pp 1–32 of the PBD). The plaintiff admitted that Digibit was the only licensee for the licensed area.

[40] On 30 March 2002, by a power of attorney (pp 38–42 of the PBD), Digibit Sdn Bhd appointed FKSB to be its lawful attorney 'to do all or any of the following acts or things in relation to the said land' which are as follow:

(a) to represent us in all dealings with the government in particular, to apply to the Forest Department or other governmental authorities for the issuance and renewal thereof of licenses, permits, passes, for entry onto the said land for the purpose of survey, extraction and removal of timber there form, and to sign, and execute all documents in connection therewith.

(b) to make arrangements for the survey or surveys of the said land to pay for charges and fees in respect thereof.

(c) to make payments of royalties, extraction and other charges payable to the government in respect of timber extracted and removed from the said land, and other dues and charges payable to government in respect thereof.

(d) to engage contractors or subcontractors including our attorney itself to extract and remove timber from the said land, and for that purpose, to enter into agreement or agreements on such terms and conditions as our attorney shall think fit.

(e) to make arrangements or enter into agreements with buyers including our attorney itself for the sale of all logs produced from the said land, to sign, seal and execute all documents that may be necessary for the purposes.

(f) to pay and receive monies and give effectual receipts thereof in respect of extraction fees and other charges and in respect of the sale and shipment of logs.

(g) to make payment of deposit into bank as may be required by the Forest Department, and to open and deposit monies into the trust account for the development of the said land or any land as may be designated by the government.

(h) to apply and claim from the Forest Department or other departments for refund of all excess payment of royalty and/or cess and/or extraction charge and/or bank guarantee and/or timber hauling distance rebate paid to the said departments from time to time in respect of the said land.

(i) to receive and give receipt on any amount refunded by the Forest Department (all cheques for the refund to be made and issued in the name of Fajar Kayangan Sdn Bhd (571025–W)). And to indorse and accept all negotiable instrument which have been made payable to us.

(j) to appoint and remove at its pleasure any substitute for or agent under it in respect of all or any of the matters aforesaid.

(k) generally to do all such acts and things as may be necessary or expedient in connection with the aforesaid purposes as fully and effectually as we ourselves could do.

[41] Vide timber sale agreement between Digibit (as vendor) and FKSB (as purchaser) dated 8 April 2002, which, amongst others, reads:

> AND WHEREAS the vendor is desirous of appointing the purchaser to extract and remove all merchantable timber from the said land on the terms and conditions hereinafter contained.

[42] The terms and conditions of the timber sale agreement are set out in full as follows:

(a) In consideration of a sum of RM83,333.33 (Ringgit Malaysia eighty three thousand three hundred thirty three and cents thirty three only)

to be paid by the purchaser for all the logs to be extracted from the said land and of the terms and conditions hereinafter reserved and contained the vendor agrees to appoint the purchaser to extract and remove all the merchantable timber from the said land.

(b) Upon the signing of this agreement, the purchaser shall pay the said sum of RM83,333.33 (Ringgit Malaysia eighty three thousand three hundred thirty three and cents thirty three only) to the vendor being full payment of the purchase price for all the logs to be extracted from the said land (the receipt whereof the vendor hereby acknowledges).

(c) The vendor shall engage the purchaser, and the purchaser shall accept the engagement, to extract and remove all merchantable timber from the said land.

(d) At its own expense, the purchaser shall cut, fell, debark, and deliver all the merchantable timber to such log pond as designated by the purchaser. Only timber of merchantable quality shall be extracted from the said land.

(e) All logs extracted from the said land and delivered to the log pond shall belong to the purchaser and the purchaser shall as soon as practicable identify each and every log extracted from the said land with a hammer mark and with a serial number.

(f) The purchaser shall be responsible for the payment of timber royalties and other charges payable to the government and shall ensure the prompt payment of all bills from the government.

(g) The purchaser shall keep proper records of the number and volume of logs extracted from the said land and measured by the Forest Department for royalties purposes and of logs delivered to the log pond.

(h) The vendor shall provide and permit such access to the said land as may be necessary for logging operations under this agreement and shall do its utmost endeavours to obtain such access from the government or owners of neighbouring land, and the purchaser shall be responsible for the payment of all expenses incurred in respect thereof.

(i) The purchaser shall ensure that all the logging operations are conducted in accordance with the laws, rules, regulations, directions and instructions of the Forest Department or other governmental authorities, and the purchaser shall indemnify the vendor against all claims or losses that may be made against the vendor that arise out of the logging operations undertaken by the purchaser.

(j) This agreement shall not be a personal agreement and the purchaser may assign or subcontract the logging operations or any part thereof to any person, firms or company without having to obtain the prior

approval or consent of the vendor. The vendor shall not interfere directly or indirectly with the logging operations undertaken by the purchaser under the provisions of this agreement.

(k) In the event that the said license can be renewed/extended the vendor shall assist the purchaser to renew/extend the said license in order to enable the purchaser to complete the extraction and removal of all the merchantable timber extracted from the said land.

[43] In turn, FKSB (as vendor) and Syarikat Berjaya (as purchaser) entered into a sale and purchase agreement dated 23 April 2002 (pp 63–69 of the PBD) whereas 'the Vendor is desirous of selling unto the Purchaser and the Purchaser is desirous of purchasing from the vendor all the merchantable timbers from the said Lands on the terms and conditions hereinafter provided', which are as follows:

(a) In consideration of the terms herein provided, the vendor hereby sell to the purchaser and the purchaser hereby purchase from the vendor all the standing merchantable timbers extracted from the said lands at the purchase price of Ringgit Malaysia five hundred fifty thousand only.

(b) Upon the signing of this agreement, the purchaser shall pay directly to the vendor the said purchase price of Ringgit Malaysia five hundred fifty thousand only, receipt whereof the vendor hereby acknowledge.

(c) The purchaser shall be responsible at its own costs and expenses to apply for the licensees as may be necessary from the Forestry Department or other government departments of the State of Sabah relating to the felling and removal of the standing merchantable timbers and removals thereof comply with the conditions and requirements contained the said licensees.

(d) The purchaser shall at all times during the continuance of this agreement and before felling any standing merchantable timbers ensure and ascertain the boundaries of the land and shall be wholly responsible for the consequences of felling the timbers outside the boundaries of the land.

(e) The purchaser shall make available an acceptable guarantee or a deposit of funds in such amount as may be required from time to time by the government as security for the payment of royalties and other charge (if any) in respect of the standing merchantable timbers sold under this agreement PROVIDED THAT purchaser shall be entitled to claim for the refund of the deposit.

(f) If the course of the performance of the felling and removal of the standing merchantable timbers from the said land by reason of any non-compliance on the part of the purchaser with the conditions and

requirements contained in the aforesaid licensees or with the provisions of the cl 3 hereof the vendor shall suffer fines penalties or legal actions and proceedings by the Forestry Department aforesaid the purchaser shall be compensate or indemnify the vendor fully for and against such fines penalties or legal action and proceedings.

(g) The purchaser shall pay all royalties net proceeds and other charges (if any) in respect of all the merchantable timbers extracted and sold under this agreement.

(h) The purchaser shall maintain a safe system of works in the course of felling and removing the standing merchantable timbers from the said land and shall indemnify the vendor against all costs expenses claims or proceedings arising out of such felling and removing of the standing merchantable timbers from the said land.

(i) This agreement shall in no way be deemed or constructed as partnership or joint venture agreement between the parties hereto, and all sums of money which the purchaser shall receive on export or re-sale of the merchantable timbers purchased under this agreement shall be solely for the benefit or loss of the purchaser.

(j) In event of any dispute, uncertainty, and/or inconsistency as the price or conditions relating to sale of the merchantable timbers from the said land, the terms and conditions of this agreement shall prevail and override all other agreement or agreements made between the parties hereto.

(k) The purchaser shall pay income tax and other dues payable to the government arising from the sale of the merchantable timbers under this agreement.

[44] On the same date, FKSB also executed the substitution under a power of attorney (pp 81–84 of the PBD) appointing Syarikat Berjaya as its attorney to do certain things and acts in connection with the licensed area.

[45] Upon reading the contents of the timber sales agreement between Digibit Sdn Bhd and FKSB, it is an inescapable conclusion that Digibit had parted and given up all its rights and interests in the timber license for financial consideration agreed to be paid by FKSB. Digibit Sdn Bhd, as the licensee had effectively assigned and transferred all their rights in the timber licence to FKSB.

[46] The power of attorney granted to FKSB, to borrow the expression from Ismail Khan CJ (Borneo) in *Lo Su Tsoon*, 'was a colourable device' to deceive others into believing that FKSB was operating as agent for Digibit Sdn Bhd, the licensee. FKSB as attorney had taken over the right of the

licensee and enjoyed the full benefit under the license such as entering the licensed area and felling the timber logs and dealing with it as the owner.

[47] Indeed Digibit Sdn Bhd had admitted in its show cause letter (p 115 of the DBD) that it had 'sold' the timber license to FKSB. Hence the execution of both the timber sales agreement and the power of attorney between Digibit Sdn Bhd and FKSB were clearly in breach of s 24(6) of the Enactment and therefore illegal.

[48] In the above case of *Tindok Besar*, Federal Court held that there is a difference between the transfer of rights contained in a license and permitting the use of it. Thus, in that instance the agreement to 'take over and use' the road within the TOL was not a transfer of rights but a permit to use and consequently was not illegal against non-transferability provision.

[49] I cannot and found no reason to believe that Syarikat Berjaya was merely having the permission to use the license. It is apparent from perusal of the substitution of power of attorney that Syarikat Berjaya as attorney had taken over the full management and operation of the licensed area upon payment of financial consideration to FKSB for agreeing to relinquish its right under the license vide the power of attorney granted by Digibit Sdn Bhd to it.

[50] To my mind, the arrangement vide the agreement, the power of attorney, the sale and purchase agreement and the substitution of power of attorney between Digibit Sdn Bhd, FKSB and Syarikat Berjaya are very similar to that in *Lo Su Tsoon* and *Sundang Timber*. Based on the authority of these two cited cases, the assignment of the timber license firstly by Digibit Sdn Bhd to FKSB and then subsequently by FKSB to Syarikat Berjaya are illegal and in contravention of s 24(6) of the Enactment.

[51] In arriving at this conclusion, it would follow that the plaintiff has no locus standi to commence this action.

ARE THE DEFENDANTS ESTOPPED FROM RAISING THE ISSUE OF LICENSE BEING PERSONAL TO HOLDER?

[52] It was contended for the plaintiff that the dispute herein was not a dispute between the parties to an agreement. The defendants could not raise this issue of illegality as they were not parties to the agreement between FKSB and the plaintiff.

[53] It was next contended for the plaintiff that the defendants were estopped from raising the issue of license being personal to holder. Plaintiff relied on estoppel on the ground that the first defendant had allowed the plaintiff to renew the license on behalf of the licensee, to pay royalty as well as to apply for removal passes for 2,704 logs previously. Further, the first defendant was fully aware that the plaintiff was felling logs in the six licensed area and took no action to stop him. To lend support, *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 was relied on. According to the plaintiff, the defendants owe a duty to the public to duly inform them upfront what can and cannot be done and not to 'blow hot and cold'. On this basis, it was submitted that only parties to the agreement can raise the issue of illegality and not the defendants.

[54] The defendants did not agree and argued that the principle of estoppel is not relevant in the present case. They put forward three cases: *Public Textiles Berhad v Lembaga Letrik Negara* [1976] 2 MLJ 58; *Commissioners of Customs and Excise v Hebson Ltd* [1953] 2 Lloyd's Rep 382 (cited in *Public Textiles*); *Maritime Electric Company Ltd v General Diaries Ltd* [1937] AC 610.

[55] Have the defendants the right to raise the issue of illegality in this case? It must be borne in mind that there is this principle of public policy: *ex dolo malo non oritur* action. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. (See *Chilty on Law of Contract*, General Principles, (1994), para 16–007, p 776).

[56] In this case the plaintiff's purported cause of action is founded on the sale and purchase agreement entered between FKSB and Syarikat Berjaya. Surely the defendants are allowed to raise the issue that the assignment of the timber rights by the original licensee Digibit Sdn Bhd to FKSB under the colourable device of the power of attorney and that FKSB's subsequent assignment of its right and interest under the licence also through another colourable device of substitution of power of attorney have all contravened s 24(6) of the Enactment and therefore illegal. It being illegal it will be offensive to public policy for the court to lend its aid to support plaintiff's cause of action. It would be against public policy to allow the plaintiff to take advantage of the illegal contracts:

(a) firstly by entering and felling the timber logs and enjoying the full benefit under the timber license; and

(b) subsequently, claiming against the defendants for damages on the alleged wrongful seizure and disposal of the seized logs allegedly felled within the licensed area which he had not right to enter as he is not a licensee.

[57] In *Public Textiles Berhad*, it was held that the board was not estopped from claiming the amount although the appellant had utilised the account rendered by the board for the purpose of costing their products. To have admitted the estoppel would have had the effect of nullifying the statutory provisions of the Electricity Act 1949.

[58] In *Commissioners of Customs and Excise*, Pearson J held that customs officers who had mistakenly allowed import of goods of a certain type in the past were not thereby estopped from claiming that goods of the same type were being imported in contravention of an order under the Import, Export and Customs Powers (Defence) Act 1939 (UK).

[59] From the cases referred to above, it is amply clear that the plaintiff cannot rely on the doctrine of estoppel. The effect will nullify the statutory provisions or to prevent the enforcement of law. Therefore even though the first defendant had in the past mistakenly or otherwise allowed the plaintiff to pay for royalty and to apply for necessary passes or renew the license, that does not prevent the first defendants from raising the issue of illegality. The assignment of the timber sale agreement by Digibit Sdn Bhd to FKSB vide the power of attorney and by FKSB to Syarikat Berjaya vide substitution of power of attorney remains illegal as they contravened s 24(6) of the Enactment. To accept the plaintiff's argument would mean to allow a person to achieve by estoppel against him something which he could not otherwise lawfully do. The acceptance of estoppel would have the effect of nullifying the provision of the Enactment and allowing an act which under the enactment could not otherwise be lawfully done.

[60] In view of the above finding on illegality, I again hold that the plaintiff has no locus standi to bring this action against the defendants. Accordingly the plaintiff's claim should be dismissed. I do so order with costs to the defendants to be taxed unless agreed.

[61] For the sake of completeness, I shall proceed to consider the following issues raised in the plaintiff's statement of claim.

WHETHER THE PLAINTIFF HAS LOCUS STANDI TO THE DECLARATION THAT THE REFUSAL TO RENEW THE TIMBER LICENSE IS UNLAWFUL AND MALA FIDE

[62] Assuming that the plaintiff was a mere purchaser of the timber logs under the sale and purchase agreement as he claims, (which I have found he is not), has he the locus standi to seek the declaration that the first defendant's refusal to renew the timber license is unlawful and with mala fide? It must

first be ascertained the relationship between the plaintiff and the first defendants that give him the legal standing to seek the declaration under prayer (i) of the statement of claim.

[63] It was submitted for the plaintiff that the plaintiff had been renewing the license for Digibit Sdn Bhd and the first defendant had not raised any objection. Why should the first defendant object to the plaintiff renewing the license for Digibit Sdn Bhd? It must be borne in mind that the first defendants is not a party to any of the agreement between Digibit Sdn Bhd with FKSB and between FKSB with Syarikat Berjaya. There is no law that says license must be renewed only by the licensee and the forestry department should reject or object to applications which are not submitted by the licensees themselves.

[64] In my considered opinion, the plaintiff has also no locus standi to seek the declaration under prayer (1) of the statement of claim.

[65] In any event the cancellation of the license was in accordance with s 24D of the Enactment, the relevant provision states:

(iv) Unless the notice has been cancelled, the director shall within thirty (30) days from the issuance of the notice required the holder of the license to show cause why his license should not be cancelled or suspended;

(v) Anyone who is enquired to appear to show cause shall be notified in writing by the director the nature of the breach or offence committed by him;

(vi) The director after the inquiry may cancel the license, or suspend the license.

[66] It is an undisputed fact that the first defendants had written to the licensee Digibit Sdn Bhd vide the letter dated 20 July 2005 (p 245 of the PBD) notifying the licensee that an offence under s 36(1) of the Sarawak Forest Ordinance (Cap 126) had been committed and asked it to show cause why the license should not be cancelled.

[67] The licensee responded promptly and in its show cause letter dated 22 July 2005 (p 115 of the DBD), it informed that it has sold off the license to FKSB vide the power of attorney and that it was not responsible for the offence under s 36(1) of the Forest Ordinance committed by FKSB. It further stated that it agreed to any action to be taken by the Director of Forestry in the matter including cancellation of the license.

[68] The above undisputed facts show that the cancellation of the license was in accordance with the procedure laid down in s 24D of the Enactment.

A IS THE PLAINTIFF ENTITLED TO DAMAGES FOR THE ALLEGED WRONGFUL SEIZURE OF 1,794 LOGS?

[69] It is the contention of the plaintiff that the 1,794 logs were felled within the licensed area. The testimony of PW1 is that out of the 1,794 logs felled in the licensed area, 792 logs had been scaled, royalty paid and removal passed issued as shown at pp 99–126 of the PBD and pp 193–238 of the PBD. Later he explained in cross-examination that application for removal is only in respect of 711 logs as shown in the documents just referred to. He had lost the documents in respect of the balance of 81 logs for which royalty had also been paid. In cross-examination he admitted that there were no documents for scaling or payment of royalty in respect of the 81 logs. He could not move out these 792 logs due to poor weather.

[70] PW1 further testified that 1,002 logs had to be removed from the licensed area due to bad weather and to prevent rotting. He did not apply for removal or transit pass or pay royalty on 1,002 logs because he was waiting for the weather to improve. He was going to pay the royalty and have the scaling done before applying for the disposal and removal pass. He said that if he had the intention to evade royalty payment and obtaining the necessary documents, these 1,002 logs which were felled before April 2005 could have been removed much earlier on and not left there until July 2005 for them to be discovered. He said that the 'inspectorate' of the first defendant had seen these logs and informed that they were felled in the licensed area.

[71] In his evidence in chief, PW1 said that there was a removal pass in respect of 792 logs as shown on p 92 of the PBD. However, a perusal of p 92 of the PBD shows that the removal pass is in respect of 711 logs.

[72] PW1 also testified that he had paid the royalty on the 792 logs, but nothing was produced to substantiate this.

[73] PW1 further testified that 'inspectorate' of the forest department would come and inspect at least once a week and sometimes twice a week, they would have found out if any logs were felled outside the licensed area.

[74] PW2 gave evidence that he was sure there were 1,794 logs felled in the licensed area in 2005 because he personally supervised the cutting of the tree and towing to the stumping point. He also personally supervised the stamping of property hammer mark and serial numbers stamped on the 1,794 logs before they were taken out to the stumping area as it is required by law that these marks and numbers should be stamped on the logs to show that they were felled in the licensed area.

[75] PW2 also said that these 1,794 logs were moved to a stumping area along a road outside the licensed area due to rainy weather and to prevent rotting. The heavy vehicle could not take them out on the muddy road. He said that these logs were removed from the licensed area to the stumping point along the road with the knowledge and consent of the forest officer. A B

[76] According to PW2, the forest officer would inspect once or twice a week to ensure that there was no felling outside the licensed area. He was not in the licensed area at the time of the seizure. However his vehicles and equipments were stuck there due to poor weather. He also had workers there to guard the equipments and logs. He was not there when the logs were seized as he was in Kuala Lumpur receiving treatment for his heart. C

[77] PW2 testified in cross-examination that the 1,794 logs felled in the licensed area had been inspected by the forestry officer, scaled and measured, though he was not sure whether or not the royalty paid. He was not the one who applied for scaling. He only measured the logs and passed the log list to the plaintiff who would then make the application. He said he had the records but was not able to produce them as he does not have them anymore. He disagreed that the 1,794 logs were illegally felled from the forest reserve but outside the licensed area, which is why he could not have the purported records. He also disagreed when it was put to him that there was never any record of the felling and extraction of the 1,794 logs. D E

[78] The defendants' version of the seizure are as follows: F

[79] DW2 gave evidence that the 1,002 logs found at Pangkalan were different from the 711 logs. There were hammer mark stamped on these logs but they were different from the original hammer mark. The original hammer mark is smaller and no longer sharp but the one found on the logs were bigger in size and sharper as shown in the photographs at pp 103–105 of the DBD, in particular, p 105. All the 1,002 were properly scaled and measure on 2 July 2005 to 4 July 2005 as at pp 43–68 of the DBD. DW2 took photographs of these 1,002 seized logs as shown at pp 34–42 of the DBD. G H

[80] According to DW2, 792 logs had neither the property hammer mark nor forestry department hammer mark; they were merely marked with serial number in blue, red or white paint. The logs lists for 792 logs were prepared as at pp 81–102 of the DBD. Photographs showing these 792 logs are found in pp 73–80 of the DBD. I

[81] As for the dates 29 November 2005 printed on the photos on pp 38–42 of the DBD, DW2 explained that he actually took the photos on 4

July 2005. He did not realise the setting of date in the camera was not the actual date on which the photos were taken.

[82] The same explanation goes for the photographs at pp 73–80 which he said were taken on 12 July 2005 to 16 July 2005, but the dates on the photos is sometimes in December 2005. He was very sure he did not take these photos in December 2005 because he was already transferred to Mukim Ulu Sugut effective from 18 November 2005. DW2 disagreed when it was put to him that he actually took these photos in December 2005 and that these logs were not the one found by him in July 2005.

[83] DW3 who is the photographer of pp 103–105 of the DBD stated that he took the pictures of the hammer mark on 19 July 2005 without realising that the date on the camera was not properly set, hence the date shown on the pictures is 14 December 2005 and not the actual date of 19 July 2005. DW3 denied in cross-examination that pp 103–105 were actually taken in December 2005, and not July 2005.

[84] Learned counsel for the plaintiff submits that there were no other licensees working in the licensed area or nearby, the plaintiff's contractor must have extracted the logs from the licensed area as they were all marked with the hammer mark 'FD 722 RP' and the property hammer mark 'DB1'. It is submitted that the plaintiff has proven on the balance of probability that the 1,794 logs belonged to him.

[85] Learned senior state counsel submitted that the plaintiff had denied in his s 112 statement the knowledge of the 1,002 logs and 792 logs in the forest reserve. The plaintiff's contractor PW2 had also denied knowledge about the logs at the Pangkalan in his s 112 statement. Further, the plaintiff has produced no document to prove that the seized 1,792 logs belonged to him.

[86] Learned counsel for the plaintiff submitted that during the recording of the plaintiff's s 112 statement, he was not referred to the 1,102 logs and 792 logs at the Pangkalan. I have no reason to disagree with that. As such it is not correct to say that the plaintiff had denied knowledge of the 1,792 logs at the Pangkalan.

[87] Pertaining to the plaintiff's contention that all the seized timbers were stamped with the property mark 'DB1' and the hammer mark of 'FD 722 RP', it calls to mind DW2's testimony that 792 logs had neither property hammer mark nor forestry department hammer mark; they were merely marked with serial number in blue, red or white paint as shown photographs showing these 792 logs are found in pp 73–80 of the DBD. Further, the

hammer mark found on 1,002 logs were fake when compared to the original hammer as shown in the photographs at pp 103–105 of the DBD, in particular, p 105.

[88] The plaintiff made an issue on the actual date on which the photographs of the seized logs were taken and submitted that these could not be logs that were seized in view of the dates. It is submitted none of the photographs can help the defendants to show that the use of forged hammer and property mark as these photographs were taken from different logs in November or December 2005.

[89] Having heard the explanation of DW2 and DW4 why the dates on the photographs do not reflect the actual date when the photographs were taken, I find them very careless for not checking the date setting in the camera before they took the photographs. However, I can accept their explanation. I also believe and accept their evidence that the hammer mark found on 1,002 logs were fake as shown in photographs at pp 103–105 of the DBD.

[90] It is submitted for the plaintiff that the 'inspectorate' of the forestry department inspected the licensed area 2 to 4 times in a week, surely they would have noticed illegal felling activities if there were any. Further, there was never any complaint of illegal felling by the plaintiff.

[91] I think the plaintiff has misunderstood the evidence of DW2, DW3 and DW4 in respect of their frequency of inspection. It is their clear evidence that their inspection of 2 to 3 times a week is not confined to the licensed area but as clarified by DW1, it is in respect of the whole Bonggaya Forest Reserve which covers 60,000 hectares. Their frequency of visit would also depend on how active is the licensee operating and Digibit Sdn Bhd is not an active licensee (question 418 to 423 NOP). Considering the wide area of Bonggaya Forest Reserve, it is reasonable for the forest ranger to focus their supervision on active area.

[92] The plaintiff also raised an issue that the seized 1,794 logs could not have been felled within the forest reserve because no photographs were taken of the stumps in the forest reserve. It is submitted that the defendants have not proved that the seized logs were illegally felled.

[93] In my opinion, failure to take picture of the stumps does not necessarily mean there is no felling of logs within the forest reserve but outside the licensed area as found by DW2, DW3 and DW4. It must be remembered that this is not a trial where the plaintiff is charged for committing an offence under s 30 of the Forest Enactment and therefore the

burden is upon the defendants to prove that such an offence has been committed. In which connection the evidence of stumping measurement would be material.

[94] In the present case the plaintiff claimed for damages of unlawful seizure and disposal of seized logs that he claimed were felled within the licensed area and belonged to him. It is trite that he who alleges must prove. Thus, the burden is upon them to prove that the seized 1,794 logs were unlawfully felled inside the licensed area and that the first defendant's staff had seized them unlawfully.

[95] It should be noted that other than making bare assertion that the 1,794 logs belonged to them, the plaintiff has not produced any evidence to substantiate the claim. In cross-examination of PW1, he said that he had kept a record of extraction and felling of the logs in the licensed area in year 2005, however, he could not produce these records. He admitted that these documents were important. During the re-examination of PW1, he was never asked to explain why he could not produce the documents to prove that the 1,794 logs belonged to him.

[96] Timber industry is a highly regulated industry. It can be seen from the timber sale agreement and sale and purchase agreement referred to earlier that the operator are required to keep a proper record of the number of logs and the volume thereof that had been felled for the purpose of measurement/scaling and payment of royalty and application for passes. As the plaintiff as well as PW2 said they have the record of the timber logs that were felled in the licensed area in year 2005, it should not be difficult for him to produce them. Yet, he could not and no reason whatsoever was given for not doing so. The irresistible conclusion for such failure is that there were never such records because these seized logs could not have been felled within the licensed area nor did they belong to the plaintiff.

[97] It is also pertinent to note the conduct of the plaintiff after he came to know about the seizure of the 1,792 logs. PW1 also said that he came to know about the auction of the logs when he applied for removal pass for the 711 logs, which, based on the record, should be 29 June 2005. To the question why he did not claim for the logs when he found out about the auction on 29 June 2005. His replies are:

> Why should I claim since the logs belonged to me and I have not acted unlawfully (question 85 NOP).
>
> It was not necessary as the logs bear the property hammer mark and also the logs number. I do not understand why should I need to claim against my own logs. The logs belong to me (question 86 NOP).

I did ask the officer to return my logs but they refused to give them back to me (question 87).

I don't know his name (question 90 NOP).

[98] It should also be noted that the plaintiff never applied for the return of the 1,794 logs. I agree with learned senior state counsel who submitted that when a person knows that the logs belonged to him have been seized by the authority, surely he would take immediate action to claim them back. The plaintiff's reasons for not doing is laughable, namely, he had not been informed by the first defendant that he could do so. Does one need to be told that one can apply for the return of one's property when knowing that one's property has been seized by the authority? The answer is surely not.

[99] The plaintiff might be very sick due to stroke in late 2003, but that does not mean his company's operation comes to a standstill due to his illness. The plaintiff is not a country yokel. Being a timber operator he has the financial means to seek legal advice and to engage legal representation regarding the seized logs that he claimed belonged to him. He did not do so until 7 August 2006, almost a year after seizure of 1,794 logs and after the logs had been auctioned. His lawyer wrote to the defendant demanding compensation for the seizure of 1,794 logs. Why, one might ask, did he not claim for the return of 1,794 logs upon knowing of their seizure? Why wait after they had been auctioned off and a year later at that? No credible reasons have been given why he did not claim for the return of the seized logs. The irresistible conclusion is that the seized logs were not felled within the licensed area and they did not belonged to him lawfully.

PW1 AN UNIMPRESSIVE WITNESS

[100] PW1 is an unimpressive witness. He is confusing. To support this, in cross-examination he said that there was no seizure of logs. He agreed that he was not sure whether or not logs were seized by the first Defendant. He agreed that seized logs were inside the licensed area. He also said 1,002 of the seized logs were in stumping area. The figure 792 logs is not correct and it was a figure given by the first defendant. The correct number should be 711 logs for which royalty had been paid. He agreed that he is claiming 1,713 logs (see p 6 and 7 NOP). The above evidence amply show that PW1 has no idea whatsoever about the claim he made in the statement of claim.

[101] While insisting that there were only 711 logs and that the figure of 792 logs were wrongly given by the first defendant, PW1 later said that 792 was the initial figure which was reduced to 711 after scaling. This is

inconsistent with application for measurement at p 100 of the PBD which shows that the application made was in respect of 711 logs.

[102] PW1 testified in evidence in chief that he had not received a copy of the letter ie the shows cause letter addressed to Digibit Sdn Bhd at pp 245 and 246 of the PBD, yet he has a copy of the letter incorporated in the PBD. When asked in cross-examination as to why a copy of the letter is in the plaintiff's bundle of documents if he had not received the letter. He replied, 'I am not very sure because when I was very sick, I was not there, I was lying on the bed.' (question 75 NOP). He said however that during period of sickness, his staff, Mr Liau and Mr Hiew managed the company. He disagreed that his staff had received the letter and passed it to him. He explained that his staff got this letter from the office of Beluran forestry department. I disbelieve him. I am inclined to believe that PW1's staff must have received the letter and then brought to his attention, otherwise where did he get the letter to include in the plaintiff's bundle of documents.

[103] In answer to question 24 in PW1's witness statement, PW1 testified that he knew about the auction when he applied for the removal pass for the 711 logs. The application for the 711 logs was dated 29 June 2005. The notices of auction were 11 August 2005 and 19 August 2005 respectively. (pp 309 and 310 of the PBD). How can this be possible given that the auction date was much later than the application for removal pass for 711 logs.

[104] The conflicting and inconsistent answers of the plaintiff shows that the plaintiff is not a truthful witness.

CONCLUSION

[105] From the combined evidence of the failure on the part of the plaintiff to make his claim for the seized 1,792 logs promptly upon knowing of the seizure, his failure to produce the records of the seized 1,792 logs which they claimed were felled within the licensed area and the inconsistent and conflicting evidence of the plaintiff leads me to a finding that the plaintiff has not shown that these seized logs were felled within the licensed area and they were unlawfully seized. On the contrary, they show that the plaintiff knew that these seized logs were illegally felled which explained why he did not make his claim at the earliest opportunity claim for to do so would expose him to criminal procedure.

[106] For all the reasons stated aforesaid, it is my finding that the plaintiff has not proved its claim on the balance of probability. Accordingly, I dismiss the case with costs to the defendants.

Plaintiff's case dismissed with costs.

Reported by Andrew Christopher Simon